

In the High Court of Uttaranchal, at Nainital.

Criminal Misc. Application No.16/2004
(Under Section 482 of the Code of Criminal Procedure)

Roshan Lal R/o Village Shail Patal Devi,

P.S. and District Almora Petitioner.

Vs.

State of Uttaranchal Respondent.

AND

Criminal Misc. Transfer Application No. 2/2004
(Under Section 407 of the Code of Criminal Procedure)

Roshan Lal S/o Moti Ram Arya,

R/o Village Shail Patal Devi,

P.S. Kotwali, District Almora Petitioner.

Vs.

1. State of Uttaranchal,
2. Sri V.B. Rai, Sessions Judge, Almora..Respondents.

Sri P.M.N. Singh learned counsel for the petitioner.

Sri R.Rab learned Additional Government Advocate for
the respondents.

Date of Judgment: 15-04-2004

ORAL JUDGMENT (Per: Hon'ble Irshad Hussain, J.)

The petitioner in both the above petitions is an accused of Sessions Trial No. 48/2002 under sections 302,307,452,504 I.P.C. pending disposal before the learned Sessions Judge, Almora.

2- The first petition under section 482 of the Code of Criminal Procedure (for short 'Code') was filed with a prayer to quash the order dated 18-12-2003 passed by the learned Sessions Judge, Almora whereby the application of the petitioner preferred under section 311 of the 'Code' was dismissed on merit. The application under section

311 of the 'Code' was moved on 22-9-2003 after the close of the evidence of the prosecution and the statement of the petitioner-accused had already been recorded on 16-9-2003. The grounds taken in the application were not found cogent enough to recall the prosecution witnesses for further cross-examination under section 311 of the 'Code' by the learned Sessions Judge and the application was dismissed as stated above and the sessions trial was posted for arguments.

3- The second petition was preferred subsequently with a prayer to transfer the sessions trial from the file of the Sessions Judge, Almora to another Sessions Division of the State in view of the apprehension that the petitioner will not get justice as his application for recall of the witnesses had been dismissed.

4- Learned counsel for the petitioner argued that the power available to the court is plenary and for just decision of the case any witness may be recalled and re-examined on the motion of either the prosecution or the defence or the court itself and that the learned Sessions Judge fell in error in not taking into account the legal aspects of the case and also the important factor that the petitioner could not engage the counsel of his choice who was ill at the appropriate time and he was thus handicapped in his defence and further that the Investigating Officer particularly could not be cross-examined in regard to the relevant factors borne out of the documents of the prosecution. On the other hand the gist of the argument of the learned A.G.A. was that the impugned order is just and proper and that the defence having been afforded full opportunity to cross-examine the prosecution witnesses there was no occasion to recall the prosecution witnesses merely on the ground that some another counsel was engaged at a belated stage.

5- Having carefully considered the submissions of the learned counsel in the light of the facts of the case and the legal provision applicable thereto it may be pointed out at the out-set that the

application under section 311 of the 'Code' deserve to be allowed to the extent to be mentioned later on by setting aside the impugned order dated 18-12-2003.

6- Section 311 of the 'Code' reads as below:-

“311. Power to summon material witness, or examine person present- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

7- From above it is evident that any person can be summoned as a witness or recalled or re-examined at any stage of the proceeding where essential to the just decision of the case. There can be no doubt that the discretion vested in the Court under the above provision is to be exercised judiciously and not arbitrarily. As stated above the petitioner had engaged a new counsel and on this account alone the application for recall of the witnesses already examined was not legally maintainable when record reveal that Sri Chamu Singh Gasyal Advocate, one of the senior leading advocate of the judgeship was the counsel of the petitioner and the prosecution witnesses were cross-examined by him in detail. However it would be a different proposition if on other ground the witnesses may be recalled despite having been cross-examined on behalf of the defence. From perusal of the application dated 22-9-2003 under section 311 of the 'Code' the emphasis was also on some material factors which remain to be put to the Investigating Officer in cross-examination and further that the Government Expert was not produced in evidence in view of the reports having been legally tendered in evidence (exhibited as Ext. Ka. 24 and Ext. Ka.25) by the prosecution in pursuance of the provision of section 293 of the 'Code'. Another instance referred

relate to the evidence of P.W.1, Lalit Kishore, the informant who was also a Panch witness. It was stated that he did not mention the exact weapon of assault when the inquest was held. Perusal of the copy of the inquest report reveal that fire arm was mentioned as the weapon of assault and it may be pointed out that the said witness disclosed the exact nature of the fire arm in his evidence on oath in the case. The exact weapon of assault having been disclosed by the first witness as P.W.1, the defence had and availed full opportunity to cross-examine the Medical Officers examined by the prosecution with reference to the said weapon of assault allegedly used in the commission of the crime. Therefore, there was no occasion whatsoever to recall and re-examine this witness and more so because the factual aspect was clear enough and this factor could only be high-lighted at the time of the arguments to be submitted after close of the evidence of the parties. However the evidence of Investigating Officer and that of the Government Expert stand on different footing and in the interest of justice it was essential to summon the Government Expert as prosecution witness and to record his evidence in the case and also to recall the Investigating Officer so that he may be further cross-examined by the defence. To that extent only the application of the defence deserve to be allowed by setting aside the impugned order dated 18-12-2003.

8- The application for transfer of the case was filed in view of the order passed by the Sessions Judge on the application under section 311 of the 'Code' preferred by the petitioner. The application was dismissed on merit by impugned order dated 18-12-2003 and there is nothing on record to indicate that the Sessions Judge was in 'any way prejudiced' with the petitioner and on that account the said application for recall of the witnesses was dismissed. There being no merit in the transfer petition the same is liable to be dismissed.

9- For the reasons aforesaid the first petition under section 482 of the 'Code' is allowed and the impugned order dated 18-12-2203 of the

learned Sessions Judge is set aside. The application of the petitioner dated 22-9-2003 under section 311 of the 'Code' is allowed to the extent that the Government Expert shall be summoned as a prosecution witness and examined in the sessions trial and further that the Investigating Officer shall be recalled so that the defence may further cross-examine him. Thereafter the defence shall be called upon to enter into defence and the sessions trial shall be disposed of according to law at the earliest.

10- The second petition under section 407 of the 'Code' is dismissed. No order as to costs.

(Irshad Hussain, J.)

ISB